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NO. 83-794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE ERFTMIER,
Petitioner

v.

ROWAN COMPANIES, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the trial court in a bench trial committed clear error in finding the defendant, a Jones Act employer, negligent and defendant's vessel unseaworthy for requiring the plaintiff, a young and apparently healthy seaman with no history of back problems, to enter an access hole measuring 2½ feet high by 18-20 inches wide that led to a void space beneath a bathroom on the vessel, where the *undisputed* evidence proved not only that hundreds of entrances and exits had been made into and out of the same access hole without any incident of injury, but that other comparable vessels are similarly constructed, and further that the only occasion anyone had to enter the access hole was to perform maintenance in order to keep the vessel seaworthy.

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court:

Respondent, Rowan Companies, Inc. (hereinafter "Rowan" or "Employer"),* respectfully submits this its Brief in Opposition to the Petition for Writ of Certiorari filed by Bruce Erftmier (hereinafter "Erftmier") and respectfully prays the Court deny issuance of the writ.

OPINIONS BELOW

Petitioner correctly reproduced in his petition the opinions of the courts below.

* Rowan's heretofore unnamed affiliate, Perfedoria Guerra Negro is listed here in compliance with Rule 28.1.

JURISDICTION

Respondent acknowledges that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(1), but Respondent shows there are no "special and important reasons" as required by Rule 17.1 of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

STATUTES INVOLVED

Petitioner, though contending that the Jones Act, 46 U.S.C. § 688, and Rule 52(a) of the Federal Rules of Civil Procedure are involved in this case, does not contend that any construction of those statutes is necessary in this Court. Respondent submits that those statutes, while pertinent to the case, are not involved in the sense of requiring any clarification or construction.

The Jones Act, 46 U.S.C. § 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Respondent cannot accept the statement of the case presented by Petitioner. Respondent respectfully contends Petitioner's statement suffers from significant omissions and inaccuracies both with respect to the facts as contained in the record and with respect to the opinion of the court of appeals.

Petitioner filed an action in the United States District Court for the Southern District of Texas, in which he claimed damages under the Jones Act and under the

General Maritime Law as a result of a back injury he alleges he sustained in November 1980 while employed as a head roustabout on Respondent's drilling tender vessel, the ROWAN III. (R. 110). In essence, Erftmier claimed that because of the size and location of an access hole leading to a void space beneath a bathroom, through which access hole Erftmier was attempting to pass when he says he hurt his back, Rowan was negligent for failing to provide Erftmier with a reasonably safe place to work and that the vessel was, therefore, unseaworthy. (T. 12-19).

The district court, in a bench trial, agreed with Erftmier and awarded him $600,000. (R. 9).[1]

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1. The dispositive findings of fact made by the trial court are as follows:

> 8. The void space was aft of the boiler room, and its entry was through a vertical, oblong access way (sometimes referred to as a scuttle hole), approximately 2-2½ feet high and 18-20 inches wide. The bottom of the access way was approximately 6 inches above the deck.
>
> 9. There were one or more steel pipes partially obstructing the scuttle hole leading into the void space.
>
> 10. Because of the small size, shape and location of the scuttle hole, Plaintiff had to stoop and bend his body in order to attempt an entry. During this effort, he injured his back.
>
> * * *
>
> 21. Because of the size, configuration, and distance off the deck, the scuttle hole which Plaintiff attempted to crawl through in November 1980, was not a reasonably safe place for Plaintiff to work aboard the vessel.
>
> 22. The Defendant was negligent in its failure to provide a reasonably safe place for Plaintiff to work and such negligence was the proximate and/or producing cause of the Plaintiff's injuries.
>
> 23. The Defendant's failure to provide a reasonably safe place to work for Plaintiff rendered the vessel unseaworthy and such unseaworthy condition was the proximate and producing cause of Plaintiff's injuries.
>
> (R. 7, 9).

The undisputed evidence in this case was as follows: As of the date of Erftmier's alleged injury,[2] he had been employed for about ten months either as a roustabout or as a head roustabout on the ROWAN III, a drilling tender vessel located offshore Louisiana in the Gulf of Mexico. On the date in question, and for two days immediately preceding that date, Erftmier had been supervising the work of a crew of three roustabouts: Paul Loftin, Donald Ray Kervin, Jr., and Robert Johnson (T. 24). For two days the crew had been chipping rust from a void space beneath a bathroom area on a lower deck of the vessel (T. 16). The void space was between three and three and one-half feet high and principally contained water pipes from the bathroom overhead (T. 99, 170). The bathroom area and the void space in question were aft of a boiler room and the whole area contained a great many pipes and valves (T. 50).[3]

Chipping the rust from the metal surfaces of the void space and repainting the same ~~was~~ were necessary to keep the

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2. The exact date of Erftmier's alleged injury is uncertain, because Erftmier could not pinpoint the date. The crew on the ROWAN III worked seven days on and seven days off (T. 14). When aboard the vessel, the crew worked twelve hour watiches (T. 14). The period of employment during which Erftmier claims he was injured began on November 27 and ended on December 4, 1980 (T. 198, Def's Ex. 2A-2C). He did not know the actual date of the alleged incident where he contends he was injured (T. 24). Neither did he know the time of day of the incident (T. 55). Erftmier, by his own admission, did not tell any of his superiors (or anyone else for that matter) on the tender that he had been injured, and he did not at that time fill out an accident report form (T. 59-60). However, if he is to be believed, the incident occurred about halfway through a week-long hitch in November, so that November 30 seems to be the most likely date that fits those facts (T. 20).

3. Photographic evidence showing the access hole in question and the entire area surrounding the void space was in the record and before the court of appeals. See, in particular, Pl. Ex. No. 3.

vessel seaworthy and to enable the vessel to pass United States Coast Guard inspections (T. 137, 174). Access to the void space was by way of an oblong, oval hole in the bulkhead, and the access hole measured about two and one-half feet high by eighteen to twenty inches wide (T. 99). The access hole was six inches off the deck (T. 99). Donald Ray Kervin, Jr., one of the roustabouts who was working in the void space at the time Erftmier attempted to pass through the access hole, testified he had been into access holes such as the one in question about 200-300 times (T. 100). Prior to his employment with Rowan, Kervin had been employed by Avondale Shipyard in New Orleans and had been engaged in the construction of vessels like the ROWAN III (T. 122). Kervin testified that all access holes leading into the void spaces on similar vessels are of about the same size (T. 122-123).

Erftmier testified he went to check on the progress of the crew and squatted down in preparation for entering the access hole (T. 19). As he was sticking his head through the hole, he felt a sharp pain in his left leg (T. 19). Erftmier does not contend there were any foreign substances on the floor or that there was bad lighting (T. 57).[4] His sole contention of negligence and

4. Erftmier's verbatim testimony is as follows:

Q. Are you telling the court the only thing that occurred was that you went down to enter this accessway into the void space and you—what did you do? Did you kneel down or did you stoop down or bend down or what did you do?

A. Well, I can't remember the exact motion that I used to get into the hole. As I recall, the closest I remember I made a stooping motion, got down on my hands and knees and had to twist my shoulder to pass through the hole.

Q. And you never did get through?

A. No, sir, I didn't.

Q. You didn't slip and fall?

of unseaworthiness of the vessel is confined to the size and location of the access hole (T. 57). He argues that because there were water pipes and electrical conduits in the vicinity of the access hole and because the access hole was no larger than it was, Rowan failed to furnish him a reasonably safe place to work (T. 57).

The *undisputed* evidence in the record shows that over a period of many years numerous seamen made hundreds of entrances and exits from the access hole in question prior to Erftmier's alleged injury, and there is no evidence of any injury to anyone other than Erftmier.[5]

A. No, sir.
Q. The lighting didn't have anything to do with the injuries you sustained or lack of lighting?
A. I don't remember.
Q. No other injury on the vessel? Just that you had to enter a confined space?
A. Very confined.
Q. That is the only contention you are making as to anything wrong on the vessel the confined space?
A. Yes, and possibly the location.
Q. And that is the same space the other men had gone in and out of when they were working a couple of days?
A. To the best of my knowledge.
(T. 57-58).

5. Petitioner's statement on page 8 of his petition in this Court that, "the principal conflict in the testimony before the District Court concerned previous passage through the scuttle hole into the void or crawl space," is simply not true. As detailed above, there was undisputed evidence from workers who had worked on the vessel for substantial lengths of time that they had been in and out of the access holes on the vessel, including the access hole in question, numerous times and had never been injured. Loftin and Johnson, the two roustabouts in Erftmier's crew, who Petitioner says had never been through an access hole, had only been employed on the vessel for ten months and six months respectively. Moreover, Loftin and Johnson had been in and out of the access hole many times during the two days preceding Erftmier's alleged injury, and neither of them had been injured.

Kervin testified he had never heard of anyone being injured while entering the access hole in question or any other access hole (T. 106). Omar Nugent, the tender's superintendent and Erftmier's superior, had been employed on Rowan tenders over 14 years, and he knew of no one who had ever been injured entering an access hole (T. 176-177). Nugent is six feet tall, weighs 260 pounds and has a 44-inch waist (T. 173). He had gone through the access hole four or five times himself (T. 176).

Paul McDonald, the tender's crane operator and Erftmier's immediate supervisor, had been employed on the ROWAN III for over 19 years (T. 134). He testified it was necessary two or three times each year to perform the type of maintenance Erftmier's crew was performing (T. 136). McDonald had been in and out of the void space, for various reasons, hundreds of times (T. 137). Coast Guard inspectors had also been into the void space (T. 137).

All the roustabouts who were working in the void space testified that because of the presence of the bathroom overhead, water had to be mopped up from the floor of the void space before work could begin (T. 100; Loftin p. 11).[6]

The undisputed medical evidence showed that at the time of Erftmier's alleged injury, unknown to either Erftmier or Rowan, Erftmier had a pre-existing cogenital or developmental abnormality in his spine, consisting of

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6. Reference to deposition testimony, which was not included in the transcript pagination, will be by the name of the deponent followed by the page number of the deposition where the testimony is located.

smaller than usual openings in the spine where the nerves of the spinal cord exit. (Fulford, p. 22).

SUMMARY OF ARGUMENT

The petition for a writ of certiorari in this case should be denied for the following reasons: (a) the decision of the court of appeals turns strictly on the facts of this case and involves not only no *important* questions of law, but no questions of law at all; (b) a decision by this Court would have no precedential value, because the decision of the lower court is dependent solely on the facts; and (c) the decision of the court of appeals is correct, notwithstanding the errors alleged by Petitioner.

ARGUMENT

I.

BECAUSE THE DECISION OF THE COURT OF APPEALS INVOLVES NO IMPORTANT LEGAL ISSUES, BUT DEPENDS ENTIRELY ON FACTUAL MATTERS, THE PRESENT CASE IS NOT AN APPROPRIATE ONE FOR THE EXERCISE OF THE COURT'S DISCRETIONARY CERTIORARI POWERS

Petitioner bases his request for this Court to exercise its discretionary power to issue a writ of certiorari solely upon a notion that this Court should exercise a general "supervisory power" over courts of appeals. Petitioner argues that, *considering the facts of this case*, the court of appeals so misapplied the law that justice demands this Court intervene and correct the error of the court of appeals. Every losing party at the level of the court

of appeals feels inclined, no doubt, to make that same argument, and if Petitioner's misconception of this Court's function were accepted, every losing party in the court of appeals *would* make that same argument.

The function of this Court's certiorari power, as the Court has itself stated many times and as reflected in Rule 17, is not to enable the Court to act as a higher level court of appeals. The writ of certiorari should be reserved for cases involving legal issues of general importance.[7] This Court does not "sit for the benefit of the particular litigants."[8]

The instant case clearly involves no important legal issues of general concern. On the contrary, this case involves no legal issues at all. The briefest reading of the petition in this case reveals that not even the Petitioner claims any novel or important legal issues are presented. His sole ground for urging issuance of the writ is based upon an obvious misinterpretation of that part of Rule 17 that allows this Court to exercise its "power of supervision" where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings" as to warrant such a supervisory role. Petitioner's attempt to squeeze this case into that narrow niche is unpersuasive.

That part of Rule 17 just quoted refers to wide departures from accepted procedures.[9] Petitioner makes no

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7. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

8. *Rice, supra*, 349 U.S. at 74.

9. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976).

contention that the court of appeals failed to recognize or use the appropriate standard of review. Petitioner concedes the court properly recognized and used the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. Petitioner's argument is really no more than a contention that the court of appeals should not have concluded the findings of the trial court were clearly erroneous.

Even assuming *arguendo* that Petitioner was correct, the role of this Court is not to correct alleged errors that affect only the private parties to the litigation. In any event, the undisputed evidence in this case demonstrates that the court of appeal's decision was a correct one.

II.

THOSE PORTIONS OF THE OPINION OF THE COURT OF APPEALS THAT PETITIONER CLAIMS ARE FINDINGS OF FACT ARE NOTHING MORE THAN COMMON SENSE INFERENCES FROM UNDISPUTED EVIDENCE AND ARE, IN ANY EVENT, UNNECESSARY TO THE CORRECTNESS OF THE DECISION

Petitioner complains that the court of appeals engaged in *de novo* fact finding that was not based on anything in the record. In particular, Petitioner points to the portions of the opinion of court of appeals where the court observed (1) that access holes and hatches are raised above the level of the deck in order to prevent water from flowing between compartments, (2) that designing access holes so that they would never be near pipes would be difficult, (3) that passage through the access hole was no more bothersome than many normal tasks

of a seaman, and (4) that all ships contain similar access holes.

The answers to Petitioner's complaint are many: first, the so-called findings of fact are nothing more than commonsense inferences based on undisputed evidence[10] in the record; second, whether the method of construction of the access hole is generally followed on other vessels is not vital because in the circumstances of the present case the method of construction was prudent and necessary; and third, there was direct uncontradicted evidence in support of the observations of the court of appeals.

Most important, however, is the fact that the so-called findings of fact were not dispositive of the case, as Petitioner would have the Court believe, but were, in fact, incidental to the court of appeals' decision. The heart of the decision of the court of appeals is as follows:

> A review of the record leaves us with a definite and firm conviction that a mistake has been made. There is no question that a seaman was required to bend over in order to pass through the access hole. It is likewise true that the conduits, pipes and associated hardware made entry more difficu't. But passage through the hole was no more botherso.ne than many

10. Petitioner argues repeatedly that the court of appeals misapplied Rule 52(a), F.R.C.P., by failing to give due deference to the trial court's opportunity to observe the demeanor of the witnesses and to weigh the evidence. Petitioner fails to mention, however, that the two witnesses on whom he placed his greatest reliance, Johnson and Loftin, testified *by deposition*. More importantly, the matter of the size and location of the access hole and the general layout of vessel surrounding the hole was not in dispute. In fact, the evidence on that subject was largely photographic evidence, on which the court of appeals stated expressly it relied. Thus, the court of appeals was in as good a position as the trial court to determine from undisputed evidence whether the access hole was unreasonably unsafe.

> of the normal tasks of a seaman. The job by its very nature is an arduous one. In the ordinary course of his duties, a typical seaman must bend over and reach up. He must lift heavy objects, work in confined spaces, and traverse wet and inclined decks. He must climb down ladders, pass through scuttle holes, manuever in difficult areas, and negotiate narrow catwalks. He must operate intricate equipment, handle potentially dangerous tools, suffer the wrath of the elements, and work long, weary hours. "There are inevitable hazards—some of a very severe nature—in the calling of those who go to sea in ships, hazards which when not occasioned by negligence or unseaworthiness, have to be borne by those who follow the calling." *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 678 (5th Cir.), *cert. denied*, 396 U.S. 1037 (1969). It is the responsibility of the owner to supply a *reasonably* safe work environment in which the seaman can perform his demanding duties, not an accident-free ship. *Trawler Racer, Inc.*, 362 U.S. at 550. (Emphasis theirs)

The so-called findings of fact (except the fact that this work was no more arduous than many other chores of a roustabout—about which there was direct proof) all came after the above dispositive holding.

Furthermore, under the circumstances of this case it is clear the access hole was not improperly constructed and did not constitute an unreasonably dangerous place to work. The undisputed evidence in this case is that numerous seamen, including Erftmier's own crew, had been through the access hole many, many times without injury. It is clear that the only reason Erftmier was injured (if he was) is that he had an unknown pre-existing congenital or developmental spinal abnormality that ren-

dered him unusually susceptible to injury by bending over. In fact, Erftmier's first hospitalization was required after he injured his back while bending over in the shower *at home* to pick up a bar of soap (T. 36). Surely, Petitioner is not arguing that a Jones Act employer must design its vessels to accommodate seamen with possible, but unknown, back infirmities.

As to the matter of the access hole being raised six inches above the deck, members of Erftmier's own crew testified that water accumulated in the void space in question. Even if placing access holes above deck level is not a common practice generally, there was a clear purpose for it in this case—namely, to prevent water from migrating between compartments.[11]

Similarly, whether it is generally true that it is difficult to design access holes so that they are not near pipes, valves and conduits is immaterial. The undisputed evidence in the present case, including the photographic evidence relied upon by the court of appeals, shows that the access hole in question was aft of a boiler room and beneath a bathroom. The court of appeals, after stating

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11. In the final analysis, whether the bottom of the access hole was six inches above the deck, twelve inches above the deck or flush with the deck is irrelevant. Since the floor of the bathroom was at most three and one-half feet off the deck, the access hole could only have been six inches higher than it was. There was not a scintilla of evidence that the distance of the hole off the deck, six inches more or less, would have had any causal relationship to Erftmier's injury. Petitioner himself recognizes the ambiguous nature of the trial court's finding of negligence due to the access hole being six inches off the deck. The trial court did not make clear whether it felt the hole should have been higher or lower. Petitioner suggests it should have been higher. That being the case, the court of appeals' statement concerning the reason the access hole was off the floor (to prevent water from flowing between compartments) is totally irrelevant to Petitioner's position.

that it would be difficult to design passageways so that they would never be impaired by pipes and the like, then added, "This is especially true when the hole must be located below a bathroom and beside a boiler room." Thus, the court of appeals based its general observations on the specific facts of the present case—not the other way around.

As to the passage through the access hole being no more bothersome than many other chores a roustabout has to perform, there was direct evidence to support that statement. The evidence showed without dispute that chipping rust and repainting voids was commonplace work of roustabouts. (T. 136). The roustabouts who were actually working in the void had to work in a space only three to three and one-half feet high in a seated position for hours at a time. (T. 99; Loftin, p. 28). Furthermore, the court of appeals' general observation that a seaman's work is arduous is simply common knowledge. As the court of appeals noted, passage through the access hole may have been bothersome, but the fact remains that innumerable seamen passed through it many times without injury.

As to other vessels having access holes of similar size and shape, there was direct testimony of that fact by both Donald Kervin, who had worked in ship construction, and by Omar Nugent, who had worked on similar vessels for fourteen years. (T. 122-123, 173).

In summary, the statements of the court of appeals that Petitioner has mischaracterized as findings of fact are in reality either based on direct evidence or are reasonable inferences from direct evidence. In any event, *even if* the court of appeals' statements concerning

methods of construction of vessels generally are not viewed as reasonable inferences, it is hardly the role of this Court to correct such errors that affect only the parties to this case, and this is especially so where, as here, the errors, if any, are harmless.

III.

THE OPINION OF THE COURT OF APPEALS IS CORRECT WITHOUT REGARD TO THE ERRORS ALLEGED BY PETITIONER

In a nutshell, this is a case where a seaman with a pre-existing back abnormality, of which neither he nor his employer was aware, allegedly injured his back attempting to enter an access hole that had been traversed hundreds of times by scores of other seamen without any incident of injury. Erftmier's sole contention of negligence and of unseaworthiness of the vessel relates to the design and location of the access hole. Where improper design is the basis of the alleged negligence, the absence of injury to others is a persuasive rebuttal of that claim.[12] Moreover, a finding of negligence requires foreseeability, and the absence of injury to anyone despite frequent use of the instrumentality in question shows a lack of foreseeability.[13]

The court of appeals' decision does nothing more than combine those settled principles with the firmly established rule that a vessel owner is only obligated to fur-

12. *Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176, 1182 (5th Cir. 1971).

13. *Id.*

nish a *reasonably* safe vessel, not an accident-proof one.[14] The trial court's determination that the situs where Erftmier was allegedly injured was not a reasonable safe place to work violated those principles, and that decision was clearly erroneous, as the court of appeals correctly ruled.

CONCLUSION

The decision of the court of appeals, which turns solely on the facts of the present case and involves no novel issues of law, is not an appropriate case for the exercise of this Court's discretionary certiorari powers. The errors Petitioner contends were made by the lower court are not well taken, and even if they were, those alleged errors are not dispositive. The decision of the court of appeals is correct.

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14. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960); *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d 1295 (5th Cir. 1977); *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675 (5th Cir. 1969), *cert. denied*, 396 U.S. 1037, 90 S.Ct. 682, 24 L.Ed.2d 681 (1970).

WHEREFORE, PREMISES CONSIDERED, Respondent Rowan Companies, Inc. respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Brief in Opposition have been mailed by certified mail, return receipt requested, to the attorney of record for Petitioner, Don R. Riddle, 5629 FM 1960, Suite 326, Houston, Texas 77069, on this 16th day of December, 1983.

THEODORE GOLLER